

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MATTHEW ANDERSON, individually
and on behalf of others similarly
situated,

Plaintiff,

vs.

KIMBALL, TIREY & ST. JOHN LLP,
AND CHRISTINE RELPH,

Defendants.

Case No.: 3:13-CV-253-JM (NLS)

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS WITH LEAVE TO
AMEND**

On January 13, 2013, Plaintiff Matthew Anderson filed a class action complaint against Kimball, Tirey, & St. John LLP ("KTSJ"), a law firm, and Christine Relph, a KTSJ associate, (together, "Defendants") alleging four claims related to Defendants' allegedly unfair debt collection practices. On February 19, 2013, Defendants submitted a motion to dismiss Anderson's complaint pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6) for failure to state a claim. In the alternative, Defendants move for an order requiring that Anderson provide a more definite statement. For the following reasons, the court GRANTS Defendants' motion to dismiss with leave to amend.

I. BACKGROUND

Plaintiff Matthew Anderson is an individual residing in San Diego, California who took out a loan (“Subject Loan”) to purchase a home. Compl. ¶¶ 10, 14. The location of the home, the amount paid for the home, the Subject Loan amount, the Subject Loan’s interest rate, the lender, the date of purchase, and other pertinent facts about Anderson’s home and the Subject Loan are not specified in the complaint. The terms of the Subject Loan were memorialized in a promissory note (“Note”), but Anderson has not provided the court with a copy of the Note. Id. ¶ 17.

Anderson claims that investors provided the funds for the Subject Loan. Id. ¶¶ 14, 15. Anderson further contends that the Originators “concealed from [him] their intent to securitize the loans and misrepresented the identity of the party providing the funds for his loan, the actual lenders.” Id. ¶ 18. No information is provided about who was actually funding the loan, how the alleged misrepresentations took place, or how the alleged misrepresentation adversely affected Anderson.

Anderson claims that invalid, fraudulent, or forged assignments of the Note to third parties were later recorded. Id. ¶ 19. Aside from this conclusory statement, however, the complaint provides no further details about the Note or the alleged assignments. Copies of the Note and allegedly invalid assignments are not attached to the complaint.

The complaint implies that Anderson’s home was later foreclosed, although no facts about the foreclosure are provided in the complaint. Anderson alleges that the amounts claimed to be in default were incorrect and/or included charges not permitted by the loan documents. Id. ¶ 20. However, Anderson does not

1 specify the amount he believed he owed, the charges not permitted by the loan
2 documents, or the total amount he was being incorrectly charged.

3 Furthermore, Anderson alleges that the Notice of Default (“NOD”) falsely
4 stated that the parties listed in the NOD presently held the Note. Id. ¶ 21. He
5 insists that Defendants knew that their clients, who are not identified in the
6 complaint, were not in possession of the Note and had not been assigned the Note.
7 Id. ¶ 22. “In fact, [Anderson believes that] none of the Defendants, or any of their
8 authorized agents, who have played a part in the non-judicial foreclosure
9 proceedings were entitled to receive payment from the loan proceeds, or title to or
10 possession of [his home].” Id. ¶ 23. Anderson therefore alleges that Defendants
11 made false, deceptive, and misleading representations regarding their ability to sue
12 to recover payment due under the Note. Id. ¶ 43.

13 Anderson has asserted one federal law claim: violation of the Fair Debt
14 Collection Practices Act (“FDCPA”). Anderson has also alleged three state law
15 claims: (1) violation of the Rosenthal Act (Cal. Civ. Code § 1788), (2) violation
16 of California Business & Professions Code § 17200 for unfair and/or fraudulent
17 business practices, and (3) negligent misrepresentation. Defendants filed a motion
18 to dismiss all of Anderson’s claims. In his response in opposition, Anderson only
19 appears to have opposed Defendants’ attempt to dismiss the FDCPA and
20 Rosenthal Act claims.

21 **II. LEGAL STANDARD**

22 To overcome a Rule 12(b)(6) motion, a plaintiff’s “[f]actual allegations
23 must be enough to raise a right to relief above the speculative level.” Bell Atl.
24 Corp. v. Twombly, 550 U.S. 544, 555 (2007). In evaluating the motion, the court
25 must construe the pleadings in the light most favorable to the non-moving party,

1 accepting as true all material allegations in the complaint and any reasonable
 2 inferences drawn therefrom. See, e.g., Broam v. Bogan, 320 F.3d 1023, 1028 (9th
 3 Cir. 2003). The court should grant Rule 12(b)(6) relief only if the complaint lacks
 4 either a “cognizable legal theory” or facts sufficient to support a cognizable legal
 5 theory. See Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).
 6 A facial challenge to a law does not require further facts to be developed because
 7 it only constitutes a question of law. See Fortuna Enters. L.P. v. Los Angeles, 673
 8 F. Supp. 2d 1000, 1003 (C.D. Cal. 2008).

9 However, allegations of fraud must meet Rule 9(b)’s heightened pleading
 10 standards, which requires allegations pertaining to “the who, what, when, where,
 11 and how” of the misconduct charged. See Vess v. Ciba-Geigy Corp. USA, 317
 12 F.3d 1097, 1106 (9th Cir. 2003). When there are multiple defendants, “a plaintiff
 13 must, at a minimum, ‘identif[y] the role of [each] defendant[] in the alleged
 14 fraudulent scheme.’” Swartz v. KPMG LLP, 476 F.3d 756, 765 (9th Cir. 2007)
 15 (citations omitted).

16 **III. DISCUSSION**

17 **A. Fair Debt Collection Practices Act Claim**

18 The FDCPA was passed to prevent abusive debt collection practices,
 19 including the use of “false, deceptive, or misleading representation or means in
 20 connection with the collection of any debt.” 15 U.S.C. § 1692e. In addition, the
 21 FDCPA prohibits debt collectors from engaging in certain inappropriate
 22 communications with consumers (e.g. contact at unusual times or places that are or
 23 should be known to be inconvenient) or from otherwise harassing or abusing
 24 consumers. See 15 U.S.C. §§ 1692c and 1692d. A debt collector is also prohibited
 25 from using unfair practices, such as collecting fees not specified in the agreement

1 creating the debt, when attempting to collect the debt. See 15 U.S.C. §§ 1692f.
2 The FDCPA applies to debt collectors (rather than creditors), who are defined in
3 15 U.S.C. § 1692a as those who collect or attempt to collect a debt owed to another
4 entity. However, the FDCPA contains several exceptions to the definition of “debt
5 collector.” See 15 U.S.C. § 1692a(6).

6 In Heintz v. Jenkins, 514 U.S. 291 (1995), the Supreme Court held that the
7 FDCPA “applies to attorneys who regularly engage in consumer-debt-collection
8 activity, even when that activity consists of litigation.” See id. at 299. According
9 to the facts pled KTSJ, a law firm allegedly collecting debts on behalf of
10 unspecified clients, and Relph, one of its attorneys, appear to meet the Jenkins
11 definition. However, many pertinent facts are missing from Anderson’s complaint,
12 such as the extent of Defendant Relph’s involvement, thereby preventing
13 Defendants from asserting possible exceptions to the FDCPA.

14 Although Defendants could conceivably be debt collectors under the
15 FDCPA, Anderson has not asserted any facts establishing that the Defendants used
16 “any false, deceptive, or misleading representation or means in connection with the
17 collection of any debt.” 15 U.S.C. § 1692e. Anderson claims that Defendants
18 allegedly represented clients who had been improperly assigned the Note, but he
19 fails to explain why the assignments of the Note were invalid. Moreover,
20 Anderson fails to detail how, when, where, or on behalf of whom Defendants
21 “threatened to take action, namely engaging in collection activities and collection
22 and foreclosure proceedings as trustees that [allegedly] cannot legally be taken by
23 them” Compl. ¶ 43. Anderson also claims that the amount his clients owed
24 was incorrect, but he does not explain what amount, if any, was actually owed.
25 Thus, Anderson’s complaint does not even provide sufficient details for

1 Defendants to respond to the complaint and certainly does not meet Rule 9(b)'s
2 heightened pleading standard for claims alleging fraud.

3 But even if Anderson had successfully pled that Defendants illegitimately
4 attempted to collect on the invalidly assigned Note, he lacks the standing necessary
5 to challenge the Note's assignment "because [he has] not alleged a 'concrete and
6 particularized injury that is fairly traceable to the challenged assignment.'" Silving
7 v. Wells Fargo Bank, NA, 2012 U.S. Dist. LEXIS 5287, at *3 (D. Ariz. Jan. 18,
8 2012) (quoting In re MERS Litig., 2011 U.S. Dist. LEXIS 117107 (D. Ariz.
9 2011)); see also Marques v. Fed. Home Loan Mortg. Corp., 2012 U.S. Dist. LEXIS
10 173988 at *12-13 (S.D. Cal. Dec. 6, 2012). Nor does a plaintiff "have standing to
11 challenge the securitization of his loan because he is not a party to the [agreement
12 securitizing the loans]." Halajian v. Deutsche Bank Nat'l Trust Co., 2013 U.S.
13 Dist. LEXIS 20341, at *21-22 (citing Junger v. Bank of Am., N.A., 2012 U.S. Dist.
14 LEXIS 23917, at *3 (C.D. Cal. 2012)). In addition, neither the assignment nor the
15 securitization of Anderson's Subject Loan affects whether Anderson owed money
16 due to his failure to fulfill his payment obligations under the terms of the Subject
17 Loan. It only affects whom he must pay.

18 Furthermore, Anderson has not specified whether Defendants engaged in
19 any inappropriate communications, harassment, abuse, or other unfair practices
20 against him. A conclusory statement by Anderson that such acts occurred without
21 further details is insufficient to survive a motion to dismiss. Accordingly, the court
22 concludes that Anderson has failed to state any claims under the FDCPA.

23 **B. State Law Claims**

24 Because the FDCPA claim has been dismissed, no federal claims remain.
25 Anderson has not asserted existence of diversity jurisdiction. Under 28 U.S.C.

1 §1367(c)(3), the court has discretion to dismiss or retain Anderson's remaining
2 state law claims. See Lacey v. Maricopa Cnty., 649 F.3d 1118, 1137 (9th Cir.
3 2011); Schneider v. TRW, Inc., 938 F.2d 986 (9th Cir. 1991). In making its
4 decision, the court should consider judicial economy, convenience, fairness, and
5 comity. Normally, these considerations "will point toward declining to exercise
6 jurisdiction over the remaining state-law claims." Sanford v. MemberWorks, Inc.,
7 625 F.3d 550, 561 (9th Cir. 2010).

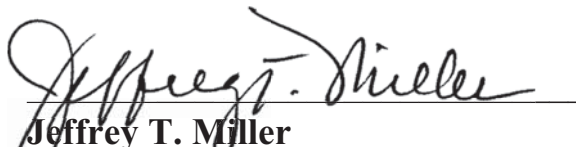
8 Here, no substantial factors weigh in favor of retaining jurisdiction. The
9 court has not yet expended extensive energy or resources on this case, and the
10 parties have not raised any reason to retain jurisdiction. Comity concerns dictate
11 that these claims should be heard in state court. Therefore, the court declines to
12 determine whether Anderson has validly asserted its three state law claims until he
13 successfully pleads a federal claim.

14 **IV. CONCLUSION**

15 For the aforementioned reasons, Defendants' motion to dismiss for failure to
16 state a claim is GRANTED with leave to amend. Anderson has until April 30,
17 2013 to submit a first amended complaint if he so desires.

18 **IT IS SO ORDERED.**

19 DATED: April 5, 2013

20 
21 **Jeffrey T. Miller**
22 **United States District Judge**
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